DE 99-135

CITY OF MANCHESTER

Petition for Valuation of Hydroelectric Facility

Order of Dismissal for Lack of Jurisdiction

O R D E R N O. 23,350

November 22, 1999

On September 21, 1999, the City of Manchester (City) filed with the New Hampshire Public Utilities Commission (Commission) a petition invoking RSA 38:9 and requesting a valuation of the Amoskeag Hydro Station (Amoskeag), a facility located within the City's borders. According to the petition, the City wishes to purchase Amoskeag from its owner, Public Service Company of New Hampshire (PSNH), but has been unable to reach agreement with PSNH as to the price.

PSNH filed a motion to dismiss the petition on October 6, 1999. PSNH contends that dismissal is appropriate because the City has failed to follow the detailed process for municipal acquisition of utility properties set forth in RSA Ch. 38. More specifically, PSNH contends that the voter approval mechanism contained in RSA 38:3 is a condition precedent for initiating valuation proceedings under RSA 38:9, and that the City's failure to follow this statutorily mandated procedure warrants dismissal of the petition.

On October 27, 1999, the City filed a memorandum in opposition to the PSNH motion. The City does not contest PSNH's assertion that it has not sought the approval of the municipal electorate pursuant to RSA 38:3. Instead, the City makes two legal arguments. First, it contends that Amoskeag is a small scale power facility within the meaning of RSA 374:-D:1, IV, that the Legislature intended to exempt such facilities from the voter approval requirements of Chapter 38, but that the Chapter 38 valuation mechanism still applies. Second, relying on the Legislature's extensive amendment of Chapter 38 in 1997, the City contends that Chapter 38's voter approval requirements apply only when a municipality seeks to establish a generation facility rather than to acquire an existing one.[1]

We take up the issues in the order raised by the City. The parties are in agreement that Amoskeag is a small scale power facility within the meaning of RSA 374-D:1, IV. The Legislature has explicitly determined that "the development by a municipality of any small scale power facility, as defined in RSA 374-D:1, IV shall not be subject to the provisions of [Chapter 38]." RSA 38:32 (omitting certain exceptions not applicable here).

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[1] The City additionally makes the argument that the pendency of the proposed Restructuring Settlement Agreement in Docket 99-099 does not deprive the Commission of jurisdiction in this docket. PSNH does not base its dismissal motion here on any issues related to the proposed settlement. Although PSNH references the settlement, which includes provisions relating to possible municipal acquisition of PSNH generation assets, we need not address the implications of the settlement here.

However, the Legislature went on to declare that RSA 38:32 shall not be "construed as exempting municipalities from the provisions of [Chapter 38] with respect to the acquisition of a utility plant and equipment if there exists a dispute between the municipality and the utility." We need go no further than the plain meaning of this language. Although we agree with the City that the Legislature intended to streamline and thus to encourage the process of municipalities becoming newly involved in small scale power generation, it is apparent from the plain language that the Legislature declined to extend such streamlining of municipal approval procedures to situations where the path to such a municipal venture requires resolution of a dispute over the valuation of utility property.

The second issue raised by the City is somewhat more difficult to resolve. Prior to July 1, 1997, Chapter 38 provided that "[a]ny municipality may take, purchase, lease, or otherwise acquire and maintain and operate . . . one or more suitable plants for the manufacture and distribution of . . . electricity." RSA 38:3 (1988). The pre-1997 version of the statute further provided that

> [a]ny city may acquire or establish such a plant after 2/3 of the members of the city council shall have voted, subject to the veto power of the mayor as provided by law, that it is expedient to do so, and after such action by the city council shall have been confirmed by a majority of the qualified voters at a regular election or at a special meeting duly warned in either case.

RSA 38:4 (1988); *see also* RSA 38:5 (1988) (providing for analogous process in towns and village districts). In 1997, the Legislature repromulgated Chapter 38 in its entirety, extensively revising it. *See* Laws 1997, ch. 206, *codified as* RSA Ch. 38 (Supp. 1999). The revised version of Chapter 38 contains a somewhat broader description of the applicable municipal authorization, *see* RSA 38:2 (Supp. 1999) (municipalities may "[e]stablish, expand, take, purchase, lease or otherwise acquire" electricity, gas or water plants). More to the point here, the Legislature in 1997 also replaced the "acquire or establish" language in the voter approval provision with the guidance that "[a]ny city may *initially establish* such a plant" subject to the same regime of city council, mayoral and voter endorsement. RSA 38:3 (Supp. 1999) (emphasis added); *see also* 38:4-5 (Supp. 1999) (making same change in analogous provision applicable to towns, village districts, unincorporated towns and unorganized places). According to the City, when the Legislature replaced the words "acquire or establish" with the phrase "initially establish" in what is now codified as RSA 38:3, the intention was to exempt

municipalities from the voter approval regime when those municipalities wish to purchase an existing utility plant rather than to establish a new one.

As the City correctly notes, we must infer that the 1997 change in this key statutory language was a deliberate legislative choice. *See State v. Mullen*, 119 N.H. 703, 709 (1979) ("We cannot assume that the elimination of . . . important language was inadvertent"). However, as we have previously pointed out, Chapter 38 "delineates a comprehensive process" and individual sections within it are properly read "within the context of the entire chapter, rather than by isolating clauses or individual provisions." *Ashland Electric Dep't*, 79 NH PUC 706, 710 (1994). Affirming our decision, the New Hampshire Supreme Court pointed out that it is always appropriate to interpret statutes "not in isolation, but in the context of the overall statutory scheme." *Appeal of Ashland Electric Dep't*, 141 N.H. 336, 340 (1997) (citation omitted). We add here that, although these decisions refer to the prior version of Chapter 38, the version presently in effect retains the same comprehensive character that makes it particularly inappropriate to read individual provisions of the chapter in isolation.

At first glance, the plain meaning of the phrase "initially establish" would indeed suggest that the City's plan to purchase a plant is not implicated. However, statutory interpretation does not "make a fortress out of the dictionary" and requires fidelity to the statute's "purpose or object." *Id*. at 341 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.)). In that light, the City's otherwise reasonable interpretation of the phrase in question is impossible to square with Chapter 38 as a whole, which contains an orderly progression from negotiation to valuation to condemnation to municipal ratification, a process set in motion "[w]ithin 30 days after the confirming vote provided for in 38:3, 38:4, or 38:5." RSA 38:6 (Supp. 1999). Moreover, the 1997 Legislature provided an explicit exemption from the voter approval provisions for "a municipality that has an existing municipal plant" and wishes to "expand . . . purchase or take . . . all or a portion of such plant owned by a utility which is necessary for expanded municipal utility service." RSA 38:12 (Supp. 1999). If we adopted the City's view – that the voter approval process applies only to municipal development of new facilities – these additional provisions would become surplusage. We are required to "presume[] that the legislature did not enact nonsensical and unnecessary provisions." *O'Brien v. O'Brien*, 141 N.H. 435, 437 (1996).

Recourse to legislative history is appropriate in these circumstances. *See Appeal of Routhier*, ___ N.H. ___, ___, 725 A.2d 665, 666 (1999) ("Where the statutory language is ambiguous or where more than one reasonable interpretation exists, we review legislative history to aid in our analysis."). Indeed, the City also directs our attention to the legislative history – although we reach a different conclusion, based on a more complete record than that which the City apparently investigated.

The present version of Chapter 38 began as House Bill 528, which originally contained two completely separate regimes – one applicable to municipal electric plants and the other to gas and water facilities. *See* H.B. 528 (1997) (as introduced). In this original version, the replacement of "acquire or establish" with "initially establish" applied only to municipal electric plants. *Id*. at 2-3, 9. When the measure came before the House Science, Technology and Energy Committee for hearing, the bill's chief sponsor, Rep. Jeb Bradley, cited as a "[h]ighlight" of the proposal the provision that a favorable two-thirds vote under what is now RSA 38:3-5 would "create a presumption that such action is in the public interest." Minutes of Hearing before the House Science, Technology and Energy Committee on H.B. 528 at 1 (Feb. 11, 1997).

As the City points out, the House quickly abandoned the approach of creating a separate regime for electric plants and

simply opted to apply the "initially establish" language to all municipal utility plants as part of a unified Chapter 38. *See* N.H.H. Jour. 550 (1997) (adopting amended version of H.B. 528). In urging such an amendment on the House, the Committee again focused on the bill's presumption of public interest as generated by a favorable two-thirds municipal vote. *See* Report of House Science, Technology and Energy Committee on H.B. 528 (March 13, 1997) (noting that this provision is "balanced" by requirement that Public Utilities Commission make the ultimate public interest determination). The City makes much of this amendment of the bill, but the only inference we can draw based on the record in the House is that lawmakers' focus was on streamlining the process of Commission, as distinct from municipal, approval. The record of the proceedings in the House sheds no light on why the Legislature replaced "acquire or establish" with "initially establish."

Debate thereafter shifted to the Senate, where the record resolves the mystery. House Bill 528 came before the Senate Committee on Executive Departments and Administration for a hearing on April 21, 1997. Representative Bradley introduced the measure by stating that it "clarifies" and "simplifies" and "lays some new groundwork for what is an existing right now of municipalities, towns and cities to . . . take over the existing utility network within their community or in some circumstances

outside of their community." Hearing on H.B. 528 before the Senate Executive Departments and Administration Committee at 1 (Apr. 21, 1997). Commenting on the "main changes" the bill would make to then-existing law, Rep. Bradley again drew attention to the rebuttable presumption of public interest generated by a favorable municipal vote. *Id*. at 2. Much later in the hearing, Rep. Jeffrey MacGillivray, a co-sponsor of the legislation, responded to a question of how H.B. 528 would affect municipalities wishing to expand their utility operations after having already embarked upon such ventures:

> It was meant to be all inclusive to provide a short cut from part of the [Chapter 38] procedure but not all of the procedure when *an existing utility* . . . went through the process. It leaves out the steps under RSA 38:3, :4 or :5, but then prescribes the method of 38:6 through :11.

Id. at 32 (emphasis added).

What informs this discussion is the New Hampshire Supreme Court's *Ashland* decision some six months earlier. That opinion affirmed our determination that the Town of Ashland, although already operating a municipal electric utility, was still required to seek Commission approval in order to construct additional distribution facilities. *Ashland*, 141 N.H. at 337-38, 341. In other words, the sponsors of H.B. 528 had as an objective overturning *Ashland* to the extent that the decision required municipalities with already extant utility operations to

obtain Commission approval for expansion plans. Considered in that light, the change from "establish or expand" to "initially establish" in RSA 38:3-5 makes complete sense: The purpose is to make clear that expansion projects do not require voter approval. The purpose was *not* to exempt from the requirement municipalities that wish to acquire utility facilities as opposed to constructing them anew. In other words, the phrase "initially establish such a plant" in RSA 38:3-5 refers to the process whereby a municipality first creates its own utility, whether by acquisition or otherwise.

We conclude with one additional observation. Although we resolve the issue before us based on principles of statutory construction, we note our agreement with the policy logic implicit in the Legislature's determination. The Legislature has drawn a distinction between negotiated agreements to sell utility facilities to municipalities, which do not require Commission approval, and municipal condemnations of utility properties, which do require our imprimatur. In the latter situation, it is completely consistent with notions of governmental efficiency to require some form of municipal governmental assent to such an acquisition as a precondition to our embarking upon the elaborate process of valuing the facility and determining whether condemnation is in the public interest. The Legislature has chosen to require the series of steps outlined in Chapter 38.

While a less cumbersome and more practical process could be imagined, it is not our place to substitute our judgment for that of the Legislature.

Because the City has not complied with the procedure outlined in Chapter 38, we are without jurisdiction to entertain the City's petition. In light of this disposition, it is not necessary for us to address the City's motion that we designate certain persons as Staff advocates pursuant to RSA 363:32, nor need we consider the recently filed motion to intervene of the Towns of Bow, New Hampton, Hillsboro, and Gorham and the City of Franklin.

Based upon the foregoing, it is hereby

ORDERED, that the petition of the City of Manchester for valuation of the Amoskeag Hydro Station is DISMISSED.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of November, 1999.

Douglas L. Patch	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary